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ALEXANDER L. STEVAS,

No. 82-1655

In the Supreme Court of the United States

OCTOBER TERM, 1982

MURDOCK HEAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government was collaterally estopped from proving at a retrial the tax object of a conspiracy charge because of earlier acquittals on substantive tax counts.

2. Whether petitioner was entitled to interlocutory review of this collateral estoppel claim.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 ..... 5, 6, 15, 16, 17
Ashe v. *Swenson*, 397 U.S. 436 ..... 8, 13, 15
Boyce v. *Alizaduh*, 595 F.2d 948 17
Iannelli v. *United States*, 420 U.S. 770 11
Johnson v. *Estelle*, 506 F.2d 347, cert. denied, 422 U.S. 1024 8
Phillips v. *United States*, 502 F.2d 227 8
Standefer v. *United States*, 447 U.S. 10 14
United States v. *Ballard*, 586 F.2d 1060 11
United States v. *Crum*, 529 F.2d 1380 9
United States v. *Dansker*, 537 F.2d 40, cert. denied, 429 U.S. 1038 7
United States v. *DeVincent*, 632 F.2d 155, cert. denied, 450 U.S. 984 15
United States v. *Dixon*, 536 F.2d 1388 7
United States v. *Dunbar*, 611 F.2d 985, cert. denied, 447 U.S. 926 ..... 15, 16, 17
United States v. *Erickson*, 601 F.2d 296, cert. denied, 444 U.S. 979 7
United States v. *Hines*, 689 F.2d 934 16
United States v. *Larkin*, 605 F.2d 1360, modified on other grounds, 611 F.2d 585, cert. denied, 446 U.S. 939 ..... 15, 16
United States v. *Lee*, 622 F.2d 787, cert. denied, 451 U.S. 913 ..... 8, 9
United States v. *Leppo*, 634 F.2d 101 ..... 15, 16

Cases—Continued Page

United States v. *Marcus*, 401 F.2d 563, cert. denied, 393 U.S. 1023 10
United States v. *Mock*, 604 F.2d 336 16
United States v. *Powell*, 632 F.2d 754 16
United States v. *Riccabene*, Nos. 82-1399, *et al.* (3d Cir. May 20, 1983) 8
United States v. *Schoenhut*, 576 F.2d 1010, cert. denied, 439 U.S. 964 8
United States v. *Scott*, 437 U.S. 82 12
United States v. *Seijo*, 537 F.2d 694, cert. denied, 429 U.S. 1043 8
United States v. *Wedelstedt*, 589 F.2d 339, cert. denied, 442 U.S. 916 7
United States v. *Wolfson*, 573 F.2d 216 9
Watson v. *Ault*, 252 F.2d 886 17

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause) 13, 14, 15
18 U.S.C. 2 ..... 2, 5
18 U.S.C. 201(f) 2
18 U.S.C. 371 2
26 U.S.C. 7201 ..... 2, 5
26 U.S.C. 7206(2) 4, 9, 12

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 697 F.2d 1200.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1982. A petition for rehearing was denied on February 10, 1983 (Pet. App. 1c). The petition for a writ of certiorari was filed on April 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of conspiring to bribe public officials and evade federal income taxes, in violation of 18 U.S.C. 371. He was acquitted by the jury on two substantive counts of aiding and abetting the evasion of taxes, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2, and acquitted by the court on a third such count after the jury hung. The court of appeals reversed his conviction on the ground that the jury had been improperly instructed (Pet. App. 1b-12b; 641 F.2d 174). On remand, petitioner unsuccessfully moved the district court to bar retrial, asserting double jeopardy objections. Both the district court and the court of appeals denied petitioner a stay of the trial pending interlocutory appeal of the district court's order (Pet. App. 1g). After a second jury trial, petitioner was again convicted on the conspiracy count and was also convicted on a substantive count of bribing a public official, in violation of 18 U.S.C. 201(f). He was sentenced to consecutive prison terms of three years and 18 months, respectively. In consolidated appeals, the court of appeals affirmed both of petitioner's convictions, as well as the district court's order denying his pretrial motion to bar the retrial (Pet. App. 1a-22a).

1. The evidence at trial showed that petitioner was founder and Executive Director of the Airlie Foundation, a tax-exempt educational association that produces documentary films. Airlie subcontracted all of its film making work to Raven's Hollow Limited, a federally taxable entity created by petitioner in 1963. Beginning in 1967, petitioner, together with others, devised a scheme to generate a "slush fund" by double

billing the travel expenses incurred by Raven's Hollow's film crews. The money derived from the slush fund, approximately $90,000 in all, was controlled by petitioner. The slush fund appeared in Raven's Hollow's books as reimbursement for actual travel expenses, and it was deducted as a business expense from Raven's Hollow's corporate income tax returns for 1973, 1974, and 1975 (9 J.A. 37-41; 10 J.A. 19-24, 70-77; 11 J.A. 4-12, 14-18, 60-62, 67).[1]

In 1970, petitioner began cultivating a relationship with Stephan Elko, an administrative assistant to Congressman Daniel Flood. Beginning in April 1971, petitioner paid to Elko a series of 11 bribes totaling $45,000 (9 J.A. 145-160, 175-178, 183-185, 195-200, 203-205). The money was divided among Elko, Flood, and Congressman Otto Passman. In return for the payments, the Congressmen and Elko agreed to use their influence with agencies and officials of the Executive Branch to obtain contracts and grants for the Airlie Foundation (see, *e.g.*, 9 J.A. 158, 165, 168, 171-173, 187, 197-198, 208-209). The money for the bribes derived from the slush fund (10 J.A. 16; 11 J.A. 9).

In September 1973, petitioner became aware that Raven's Hollow was going to have taxable income in fiscal 1973. At his direction, certain measures were implemented in order to permit Raven's Hollow to evade income taxes for 1973, including retroactively increasing rental payments on property leased from Airlie, writing in a new requirement that Raven's Hollow pay the taxes and insurance on the leased property, and deducting 1973 Christmas bonuses in 1973 although they were not paid until the 1974 tax year. The leases were backdated to appear as if they

[1] "J.A." refers to the Joint Appendix in the court of appeals.

were entered into at the beginning of fiscal year 1973, a maneuver that had tax consequences in fiscal years 1973, 1974, and 1975 (11 J.A. 40-46; 10 J.A. 279-286). Because a boat that petitioner owned was costing him a lot of money to maintain, petitioner told his friend Jack Forsythe that he could use it if he paid the storage and maintenance expenses. Thereafter, the boat was deducted from Raven's Hollow's 1973 tax return as a business expense on the basis that it constituted payment to Forsythe for legal and consultant fees. In fact, Forsythe never provided such services to Raven's Hollow (9 J.A. 318-322).

In 1974, at petitioner's direction, Raven's Hollow submitted fictitious bills to the Airlie Foundation for the rental of equipment. This money was then used to pay $25,600 to Herbert Frayer, a financial advisor to persons who made large contributions to the Airlie Foundation. Petitioner presented Frayer with two consultant fee statements and requested Frayer to sign them to make the transaction appear legitimate, even though Frayer had rendered no consulting services to Raven's Hollow. The $25,600 sum paid to Frayer was listed as a business expense on Raven's Hollow's 1974 tax return (10 J.A. 129-136, 145).

2. At the conclusion of the evidence at petitioner's first trial, the district court dismissed three counts charging him with procuring the filing of false income tax returns for the years 1973, 1974, and 1975, in violation of 26 U.S.C. 7206(2). The basis for this action was that the government had failed to prove that petitioner personally had prepared the Raven's Hollow tax returns at issue (1 J.A. 203-204), which the district court erroneously believed was an element of the offense (see Pet. App. 12a n.13). In addition, the jury acquitted petitioner on two counts of aiding

and abetting the evasion of income taxes by Raven's Hollow, in violation of 26 U.S.C. 7201 and 18 U.S.C. 2, and the court acquitted him on a third such count on which the jury had hung. He was, however, as noted above, convicted of conspiracy under a count specifying tax evasion as one of the object offenses.

On remand to the district court following reversal of the conspiracy conviction, petitioner filed a motion contending that the dismissals and acquittals on the tax counts at the first trial collaterally estopped the government at his second trial from proving the tax objects of the conspiracy, particularly overt acts 19 and 20. Overt act 19 alleged that petitioner had "caused to be prepared, signed and mailed" to the Internal Revenue Service Raven's Hollow's tax return for 1974 (see Pet. App. 11a). Overt act 20 was virtually identical to overt act 19, except that it pertained to Raven's Hollow's tax return for 1975 (*ibid.*). The district court denied the motion, and petitioner took an immediate appeal, invoking *Abney* v. *United States*, 431 U.S. 651 (1977). Both the district court and the court of appeals (Pet. App. 1g) denied petitioner a stay pending appeal, and the case proceeded to retrial, at which petitioner was convicted.

3. The court of appeals consolidated petitioner's interlocutory appeal from the denial of his collateral estoppel claims with his appeal from the second judgment of conviction, and it affirmed on both appeals (Pet. App. 1a-22a). The court explained that its refusal to grant a stay had been intended as a summary disposition of petitioner's double jeopardy claims on the ground that "as double jeopardy claims, they were frivolous" (*id.* at 5a). The court held that petitioner was not entitled to interlocutory review of his claim

that proof of the tax object of the conspiracy should be barred at retrial on collateral estoppel grounds because, even if the claim were correct, trial and conviction on the conspiracy count would not be barred (*id.* at 7a-8a). The court reasoned that "double jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible" (*id.* at 7a; footnote omitted).[2]

On the merits, the court rejected petitioner's collateral estoppel claim. The court held that the dismissal of the false filing counts on the ground that petitioner did not personally prepare the tax returns did not establish in petitioner's favor any fact relevant to the relitigation of overt acts 19 and 20 (Pet. App. 12a). The court further ruled that petitioner's acquittal on the tax evasion counts did not necessarily determine the allegations of overt acts 19 and 20 in his favor (*id.* at 13a). The court reasoned that the jury's verdicts (as well as the court's treatment of the count on which the jury had hung) could have been predicated solely on the amount of tax evaded, since the district court had instructed the jury that the amount evaded had to be "substantial" (*ibid.*).[3]

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[2] The court also explained that two other claims raised by petitioner on interlocutory appeal were not true double jeopardy claims appealable under *Abney* (Pet. App. 8a-10a).

[3] The amounts alleged to have been evaded on the two counts on which the jury acquitted petitioner were $9,294 and $6,249. The amount alleged on the count upon which the jury hung and the court acquitted petitioner was $43,695 (Pet. App. 12a n.14).

ARGUMENT

1. Petitioner contends (Pet. 8-22) that the dismissals and acquittals on the substantive tax counts at his first trial collaterally estopped the government from retrying him on the tax object of the conspiracy count. This contention was correctly rejected by the court of appeals. Moreover, the decision below turns completely on its unusual facts and does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review is unwarranted.

At the outset we note that, whether or not the jury found the conspiracy to have embraced the tax object, it is evident that the jury in fact found petitioner guilty of conspiracy to commit bribery. This is apparent from the fact that petitioner was also convicted on the substantive bribery charge, which corresponded to overt act 14 of the conspiracy count.[4] Accordingly, even if petitioner's collateral estoppel argument were correct, it would not entitle him to reversal of his conspiracy conviction. See, *e.g.*, *United States* v. *Erickson*, 601 F.2d 296, 303 (7th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Wedelstedt*, 589 F.2d 339, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States* v. *Dixon*, 536 F.2d 1388, 1401-1402 (2d Cir. 1976).[5]

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[4] Stephen Elko, through whom the bribe was paid, and Congressman Flood, its recipient, were named in the indictment as co-conspirators.

[5] *United States* v. *Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), appears to diverge from this line of authority. It is distinguishable from this case, however, in that the court found that there was a slim possibility that the jury had found a conspiracy that did not encompass commission of the substantive offense of which he was convicted. Moreover, the precedential force of other than a very narrow reading of *Dansker* even in the Third Circuit has been

In any event, the court of appeals correctly rejected petitioner's collateral estoppel claim. It is well settled that the doctrine of collateral estoppel is applicable only when the defendant can show that the jury's verdict in the prior trial necessarily decided in his favor the issue he seeks to foreclose from further litigation. See, *e.g.*, *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970); *United States* v. *Lee*, 622 F.2d 787, 790 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981); *United States* v. *Seijo*, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043 (1977).[6] Here,

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thrown into doubt by later decisions. See *United States* v. *Riccobene*, Nos. 82-1399, *et al.* (3d Cir., May 20, 1983), slip op. 25-31; *United States* v. *Schoenhut*, 576 F.2d 1010, 1026-1028 (3d Cir.), cert. denied, 439 U.S. 964 (1978).

[6] Petitioner's contention (Pet. 9-14) that there is confusion in the lower courts concerning this standard is wholly without foundation. He argues (*id.* at 13 & n.7) that dicta in two courts of appeals decisions stand for a rule that collateral estoppel must apply "when the first acquittal appeared reasonably likely to have been grounded on an issue in the second trial," thus establishing a conflict in the circuits, but this argument is specious. These decisions plainly do not stand for such a sweeping and novel proposition. They simply recognize that the collateral estoppel determination cannot be based simply on some fanciful theory as to what the first jury *could* have done, but must reflect the reality of what was actually contested at trial. For example, in *Johnson* v. *Estelle*, 506 F.2d 347, 352 (5th Cir.), cert. denied, 422 U.S. 1024 (1975), the court rejected the prosecution's suggestion that the acquittal there theoretically could have been based on some technical factors that would not collaterally estop a second conviction, noting that there was "no evidence suggesting that those factors were even presented to the first jury." Neither *Johnson* nor *Phillips* v. *United States*, 502 F.2d 227 (4th Cir. 1974), suggests any departure from the conventional collateral estoppel standard. Indeed, subsequent cases in both circuits have confirmed that the inquiry is whether

petitioner erroneously argues that the dismissals and acquittals at his first trial necessarily constituted determinations that he did not entertain the intent necessary to support a conspiracy conviction with respect to the tax object.

Contrary to petitioner's contention (Pet. 16-17), the district court's dismissal of the three false filing counts at petitioner's first trial plainly had no collateral estoppel effect on the proof that could be adduced at the second trial. The court of appeals found that the dismissals were predicated on the court's erroneous assumption that the government was required to prove that petitioner had actually prepared the Raven's Hollow tax returns at issue (Pet. App. 12a).[7] The record clearly supports that finding. In dismissing the false filing counts the district court stated (1 J.A. 203-204) that 26 U.S.C. 7206(2) is:

> a sub-section applicable to the preparer of the return. There is no evidence in this case that I heard of that [petitioner] prepared this return. This one sub-section is applicable to the preparer of the tax return to distinguish from the other one and makes him equally liable with the pre-

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the factual issue in question was necessarily determined by the first jury in the defendant's favor. See *United States* v. *Lee*, *supra*; Pet. App. 12a.

[7] As the court of appeals noted (Pet. App. 12a n.13), and as the statutory language makes plain (see Pet. App. 2d), 26 U.S.C. 7206(2) applies to any person who "procures, counsels, or advises the preparation * * * of a [false] return." Accordingly, the prohibition reaches individuals who are involved in the concealment of a taxable business interest even if they do not actually prepare the tax return. See, *e.g.*, *United States* v. *Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978); *United States* v. *Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976).

> parer such as a C.P.A. or private attorney or private accountant. That is what that statute applies to.

This finding that petitioner had not personally prepared the Raven's Hollow tax returns could not conceivably bar his retrial on the tax object of the conspiracy, because to establish the conspiracy the government had to show only that petitioner agreed with and caused others to attempt to evade taxes on behalf of Raven's Hollow. The district court itself recognized this distinction in permitting the false filing prong of the tax object of the conspiracy charge to go to the jury at the first trial despite the dismissal of the false filing counts.

Nor did the acquittals of petitioner at his first trial on the tax evasion counts collaterally estop proof of the tax object of the conspiracy at his retrial.[8] Contrary to petitioner's contention (Pet. 15-19), these acquittals did not necessarily represent a factual determination that he lacked the requisite intent to achieve the tax object of the conspiracy. In accordance with prevailing law (see, *e.g.*, *United States* v. *Marcus*, 401 F.2d 563, 565 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1969)), the district court instructed the jury at the first trial that in order for it to find petitioner guilty of tax evasion the amount evaded had to be "substantial." The substantiality of the amount of tax evaded was a contested issue in the case; defense counsel argued in summation that there was "no substantial sum due and owing"

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[8] The district court itself indicated at the hearing on the collateral estoppel claim that its acquittal on the 1973 tax evasion count did not determine any issue that would foreclose retrial on the tax object of the conspiracy. May 15, 1981 Tr. 33.

(Tr. 1805-1806). As the court below concluded, therefore, the acquittals "obviously could have been predicated solely on the amount of tax evaded" (Pet. App. 13a; footnote omitted). Indeed, this was more than a possibility; the record suggests that the most plausible explanation of the jury acquittals is that they were based on the jury's view that petitioner had not evaded a *substantial* amount of taxes. The jury was hung on the 1973 count involving an evasion of $43,695 in taxes, whereas the two counts on which the jury acquitted petitioner involved $9,294 and $6,249. Apart from the amounts, the evidence with respect to the three tax evasion counts was similar (see Pet. App. 12a n.14). Thus, it is clear that the acquittals on the substantive tax evasion counts did not necessarily represent a factual finding that "any failure to pay taxes due and owing to the United States by Raven's Hollow caused by petitioner was not willful" (see Pet. 18), and hence the acquittals did not collaterally estop the prosecution from proving at the retrial petitioner's willfulness to achieve the tax object of the conspiracy.

Petitioner also suggests (Pet. 21) that, even accepting the court of appeals' analysis, proof of the tax object of the conspiracy was barred because of the determination implicit in the acquittals that there was not a substantial amount of tax evaded. This suggestion fails for several reasons. First, it is well settled that successful commission of the substantive offense is not an element of the crime of conspiracy. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); *United States* v. *Ballard*, 586 F.2d 1060, 1064 (5th Cir. 1978). Petitioner could have conspired to evade a substantial amount of taxes, and been convicted of that offense, even if it ultimately turned out that the amount of taxes actually evaded

was insubstantial or zero. Moreover, even assuming that petitioner did not conspire to evade any more taxes than actually were evaded, the acquittals on the substantive counts still did not preclude a finding that petitioner conspired to evade taxes. The jury at the retrial, in considering a single conspiracy charge rather than three separate counts, was entitled to aggregate the amounts evaded in each year in considering whether the tax evasion was substantial. Therefore, even if the acquittals conclusively determined that the amount of tax evaded in each year was not substantial, the jury on retrial on the conspiracy count was free to conclude that the total tax evaded over the period of the conspiracy was substantial.

More fundamentally, it is simply not so (cf. Pet. 21) that conviction on the conspiracy charge required a finding that petitioner attempted to evade a substantial amount of tax. The tax object of the conspiracy encompasesd a conspiracy to file false returns, in violation of 26 U.S.C. 7206(2), which has no substantiality requirement. As noted above, the court's dismissal of the false filing counts at the first trial had no collateral estoppel effect relevant to the retrial because it was based on the court's conclusion that the government had failed to prove that petitioner himself prepared the tax returns, which in fact was not an element of the offense.[9] Thus, the govern-

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[9] Petitioner's contention (Pet. 17 n.9) that this analysis is inconsistent with *United States* v. *Scott*, 437 U.S. 82, 97 (1978), is quite mystifying. Whether or not the court's dismissals should have been characterized as acquittals and thus immune from further review as *res judicata*, it is clear that the *collateral estoppel* effect of the dismissals cannot extend beyond the factual resolutions made by the court, which per-

ment was free to prove at the retrial that petitioner conspired to file false returns, regardless of whether he actually prepared the returns or whether the amount of tax evaded thereby was substantial, and the court of appeals correctly rejected petitioner's collateral estoppel claim.

Finally, underlying petitioner's submission is the basic idea that the collateral estoppel standard applied by the court of appeals is somehow "intolerable" because it makes it difficult for defendants who present several defenses to take advantage of the collateral estoppel doctrine. See Pet. 12-13. This contention misperceives the purposes of the Double Jeopardy Clause. The provision is aimed at preventing government oppression, not at maximizing the benefits received by a defendant from a favorable disposition by the factfinder. When an individual has been acquitted on a charge, it is unfair to retry him on another charge requiring proof of the same facts necessarily resolved in the individual's favor by the first jury. See *Ashe* v. *Swenson*, *supra*. On the other hand, it is not unfair to retry petitioner on a charge on which his previous conviction has been reversed, simply because he was also acquitted on a related charge, as long as the acquittal did not resolve the factual issue to be litigated at the retrial.

It is ironic, to say the least, that petitioner should claim that the prevailing collateral estoppel standard makes it unduly difficult for him to reap the benefit of the double jeopardy protection, for petitioner has enjoyed considerable windfall benefit from the Double Jeopardy Clause. Through the combination of the

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tained to facts not in issue at the retrial (or, indeed, at the first trial), *i.e.*, petitioner's participation in actually preparing the returns.

trial judge's actions and the protections of the Double Jeopardy Clause, several strong substantive charges against petitioner never reached the jury. At petitioner's first trial, the court dismissed several substantive bribery counts against him, and it acquitted petitioner on a substantive tax evasion count on which there was plainly sufficient evidence to support a conviction. In addition, the court dismissed the three false filing counts because it required proof of an additional element not required by the statute. Because of double jeopardy problems, none of these rulings was appealed, and none of these counts was ever submitted to the jury. Against this background, it ill behooves petitioner to claim that his double jeopardy rights are being trampled because these erroneous and unjustified dispositions in his favor are not held also to collaterally estop the proof of the tax object of the conspiracy of which he was twice convicted by a jury. Cf. *Standefer* v. *United States*, 447 U.S. 10, 25 (1980).

2. Petitioner contends (Pet. 22-29) that the court below erred in permitting his retrial to go forward after he had filed an interlocutory appeal from the district court's order rejecting his collateral estoppel claim. At the outset, we note that, even assuming that the court of appeals' denial of a stay of trial was erroneous, it would be senseless to grant petitioner a third trial on the conspiracy charge when the court of appeals ultimately accorded petitioner's collateral estoppel claim full-scale review and correctly determined it to be without merit. Such a result would stand double jeopardy policies on their head because no double jeopardy interest of petitioner was violated by the failure to consider his collateral estoppel claims fully at an interlocutory stage. In any event, petitioner's contention is without merit.

Petitioner apparently concedes (Pet. 26) that a defendant is not entitled to interlocutory review of a double jeopardy claim under *Abney* v. *United States*, 431 U.S. 651 (1977), where the claim is determined to be frivolous. See *id.* at 662 n.8; *United States* v. *Leppo*, 634 F.2d 101, 105 (3d Cir. 1980); *United States* v. *Dunbar*, 611 F.2d 985, 989 (5th Cir.) (en banc), cert. denied, 447 U.S. 926 (1980). Instead, petitioner makes three arguments directed at the court of appeals' conclusion that interlocutory appeal did not lie in this case.

The court of appeals held (Pet. App. 6a-8a) that petitioner's collateral estoppel claim was not a true "double jeopardy" claim subject to interlocutory appeal under *Abney* because, even if upheld, it would only have limited the proof at retrial, but would not have barred retrial and conviction on the conspiracy count.[10] Relying on *United States* v. *Larkin*, 605 F.2d 1360 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980), and *United States* v. *DeVincent*, 632 F.2d 155, 160-161 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981), petitioner argues (Pet. 23-25) that there is a conflict among the circuits on this issue. It is true that in *Larkin* and *DeVincent* the courts accorded interlocutory review to collateral estoppel claims that would not have completely precluded con-

[10] In *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), this Court held that principles of collateral estoppel are embodied in the Double Jeopardy Clause. But that holding was made in a context where facts necessarily determined in the defendant's favor by his earlier acquittal completely barred his conviction at a second trial. Here, by contrast, even if proof of the tax object of the conspiracy count were completely barred, as petitioner claimed, petitioner would still have been subject to conviction for the conspiracy based on the bribery object.

viction at a retrial. In neither case does it appear that the government questioned the applicability of *Abney*, however, and the courts merely assumed without discusison that interlocutory appeal was available. Thus, there is not a genuine conflict in the courts of appeals on this issue. Indeed, in a case decided less than a month before *Larkin*, another panel of the Fifth Circiut expressly addressed this issue and concluded that collateral estoppel claims that do not completely bar conviction are not subject to interlocutory appeal. *United States* v. *Mock*, 604 F.2d 336, 338-340 (5th Cir. 1979). Accord, *United States* v. *Powell*, 632 F.2d 754, 758 (9th Cir. 1980). This view fully accords with the policies of *Abney*, and hence the court of appeals' decision is correct.

Second, relying on *United States* v. *Dunbar*, *supra*, petitioner appears to argue (Pet. 25-27) that the district court lacked jurisdiction to try him until the court of appeals rendered an opinion on the merits of his interlocutory appeal. This argument is specious. In *Dunbar*, the court held that, upon a written finding that the defendant's *Abney* appeal is frivolous, a district court may retain jurisdiction of the case; it further stated that the court of appeals, if requested, should review the finding of frivolousness as expeditiously as possible. 611 F.2d at 988-989. See also *United States* v. *Leppo*, *supra*, 634 F.2d at 105; *United States* v. *Hines*, 689 F.2d 934, 937 (10th Cir. 1982). However, the expedited review called for by the court in *Dunbar* applies only to the finding of frivolousness, not to the merits of the claim asserted. Here, the court of appeals' denial of petitioner's motion for a stay of the trial pending interlocutory appeal (see Pet. App. 4a-5a) constituted an implicit finding that the appeal was frivolous; indeed, the

court subsequently stated in its opinion below that its intent in denying the stay was to "dispose summarily of [petitioner's] claims on the basis that, as double jeopardy claims, they were frivolous" (*ibid.*). Accordingly, petitioner received the expedited review required by *Dunbar*.[11] Whether petitioner's cl[illegible] are on further reflection deemed to be merely erroneous rather than frivolous does not offset the jurisdiction to proceed with trial.

Finally, petitioner argues (Pet. 28-29) that the court below applied an incorrect standard of frivolousness. He suggests that the appropriate standard is the one employed in evaluating the right to appeal *in forma pauperis*—whether the claim is "without arguable merit" (*Watson* v. *Ault*, 525 F.2d 886, 892 (5th Cir. 1976)), or without merit "beyond doubt" (*Boyce* v. *Alizaduh*, 595 F.2d 948, 951-952 & n.8 (4th Cir. 1970)). The court here held that where a defendant's claim is "manifestly 'double jeopardy' in substantive content" the test is whether it is "wholly lacking in merit" (Pet. App. 6a)—a standard essentially identical to the ones set forth above. That standard was inapplicable here because the court determined that petitioner's claim was "manifestly not [double jeopardy] in substantive content." *Ibid.* In other words, the court concluded that petitioner's claim "manifestly" was not one to which he was entitled to an interlocutory appeal under *Abney*. Accordingly, just as with any evidentiary issue, whether

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[11] The failure of the district court to make a written finding of frivolousness (cf. Pet. 27) was insignificant in view of the fact that petitioner obtained appellate review of the court's oral finding (see May 15, 1981 Tr. 35-36); under *Dunbar*, the purpose of requiring a written finding is to facilitate such review. 611 F.2d at 989.

or not the merits of the appeal were frivolous, petitioner was bound to wait until after trial for an appellate hearing on his claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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